No. 14897.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

G. de Bretteville and Treasure Company, a corporation,

Appellants,

vs.

Walter B. Scoville and The Adamant Company, a corporation,

Appellees.

APPELLANTS' OPENING BRIEF.

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Origin of the Appeal.

This is an appeal by G. de Bretteville (hereinafter called "de Bretteville"), and by Treasure Company, a corporation, from the judgment of the United States District Court for the Southern District of California (Central Division) entered in cause designated "1761-Y-Civil" on May 24, 1955 [Tr. pp. 110-112].

The Amended and Supplemental Complaint filed February 23, 1945 by appellees Walter B. Scoville (hereinafter called "Scoville") and The Adamant Company, a corporation (hereinafter called "Adamant Company"), alleged that appellee Scoville is a citizen and resident of Utah and that appellee Adamant Company is a corpora-

tion organized and existing under the laws of Utah with its principal office in Salt Lake City in said State. It asserted two causes of action against both appellant de Bretteville, a citizen and resident of California, and appellant Treasure Company, a corporation organized and existing under the laws of California with its principal office in the County of Los Angeles in said State [Tr. pp. 3-4].

The first cause of action sought an accounting on the operation of a certain oil well known as Treasure Well No. 8 located at Playa del Rey, California, for a period commencing January 31, 1939 and extending to the date of suit. No appeal, is brought to this Court by these appellants in connection with the District Court's ruling on the accounting which was duly rendered by appellant Treasure Company as lessee-operator of the said oil well.

The second cause of action sought damages for appellee *Scoville* from appellants de Bretteville and Treasure Company in the amount of $26,000.00 plus interest thereon from December 31, 1939 under an alleged *oral* agreement that moneys advanced by appellee Scoville for the completion of Treasure Well No. 8 would be repaid to him on a "two for one" basis [Tr. pp. 4-9]. Liability under the second cause of action was denied in the Answer to the Amended and Supplemental Complaint filed April 19, 1945 by appellants de Bretteville and Adamant Company [Tr. pp. 9-35].

The District Court entered judgment on the second cause of action in favor of *both* appellees Scoville and Adamant Company, against *both* appellants de Bretteville and Treasure Company, in the sum of $13,000.00, and from this holding this appeal is brought.

Jurisdictional Statement.

The original jurisdiction of the District Court was invoked by appellees Scoville and Adamant Company on the grounds that the action involves a controversy between citizens and residents of different states and that the value of the amount of the controversy exceeds $3,000.00, exclusive of interest and costs. Appellants de Bretteville and Treasure Company did not controvert the jurisdiction of the District Court.

The jurisdiction of this Court on this appeal was invoked by appellants de Bretteville and Treasure Company under the provisions of 28 United States Code Annotated, Section 1291.

Statement of Facts.

Appellant de Bretteville is president and manager of appellant Treasure Company [Tr. p. 37.]

Appellees Scoville and Adamant Company entered into a certain *written* agreement with appellant Treasure Company on April 5, 1938 [Tr. pp. 27-35]. Appellant de Bretteville was not a party to the agreement.

The agreement recited that Treasure Company was owner of an oil and gas lease on which there was located an incompleted oil well (Treasure Well No. 8) and that in consideration of certain funds to be supplied by Adamant Company for completing the well, Treasure Company would issue to Adamant Company and to Scoville, respectively, certain participating royalty interests in the well.

The rehabilitation of Treasure Well No. 8 commenced about the middle of April, 1938, and continued until the drilling was completed on May 29, 1938 [Tr. p. 223].

A dispute then arose as to the furnishing of funds for completing the well with the required casing, tubing, pumping equipment, etc. A meeting took place, attended by appellees Scoville and Adamant Company and appellant de Bretteville representing appellant Treasure Company [Tr. p. 220]. The dispute was not settled, and further operations at the well were suspended [Tr. p. 221].

Appellant Treasure Company sent notice of default under the aforesaid agreement dated April 5, 1938, to appellees Scoville and Adamant Company [Deft. Ex. "Q,"* Rep. Tr. on State Court appeal, Vol. 5, pp. 1868-1869 and Vol. 2, pp. 903-904].

Henry G. Bodkin, Esq., attorney for appellant Treasure Company, subsequently entered into negotiations to settle the dispute [Tr. pp. 224-225]. Mr. Bodkin explained appellant Treasure Company's position in a letter dated October 17, 1938, to attorneys for appellees [Deft. Ex. "Q," Rep. Tr. Vol. 5, p. 1874, and Vol. 2, pp. 907-908].

A compromise was finally reached, part of which was the dismissal of litigation which had been commenced by appellees Scoville and Adamant Company [Tr. pp. 174-175], and part of which was the execution and delivery to appellant Treasure Company, on or about November 2, 1938, of a written undertaking on behalf of a party named J. Orville Seeple and also on behalf of appellees Scoville and Adamant Company, to furnish the necessary funds for the completion of the well [Deft.

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*The entire record on appeal from the Superior Court of Los Angeles County, in case designated No. 441484, was introduced into evidence in the subject lawsuit before the District Court's Special Master as "Deft. Ex. 'Q.'" [Tr. p. 45.] The same complete record was also introduced elsewhere in the trial as "Deft. Ex. 'BBBB.'"

Ex. "C," Tr. pp. 199, 228-229; Deft. Ex. "Q," Rep. Tr. Vol. 2, p. 909]. Said written undertaking is set forth in *haec verba* in the Transcript of Record herein [Tr. p. 35].

Following the compromise settlement, appellees Scoville and Adamant Company assumed full control of further operations at the well through said J. Orville Seeple [Tr. p. 131]. Mr. Seeple had been in charge of drilling operations at the well since the preceding April, when the rehabilitation of the well commenced [Tr. p. 192]. He had originally introduced appellee Scoville to appellant de Bretteville [Tr. pp. 187-188]; and, according to his own testimony, was a creditor of appellee Scoville [Tr. p. 187] who became the beneficial owner of the participating royalty interests claimed by appellee Scoville under the aforesaid agreement dated April 5, 1938 [Tr. p. 193].

Mr. Seeple was the party who executed and delivered to appellant Treasure Company the aforesaid written undertaking, dated November 2, 1938, to furnish necessary funds for the completion of Treasure Well No. 8. He signed on his own behalf, on behalf of his alleged trustee, appellee Scoville, and on behalf of appellee Adamant Company [Tr. pp. 35, 196-197].

Treasure Well No. 8 was completed and put on production on or about December 1, 1938. Two weeks later, Mr. Seeple terminated his activities in connection with the well [Tr. p. 230]. Subsequently, when appellant Treasure Company resumed control of the well, it was discovered that appellee Scoville and said Seeple had acquired casing equipment etc. for the well on credit, with unpaid bills charged against the well amounting to about $38,000 [Tr. pp. 230-231].

After December 15, 1938, appellant Treasure Company did not receive from either appellee Scoville or from appellee Adamant Company any moneys to cover the completion costs which had been incurred and left unpaid [Tr. p. 232].

Appellant de Bretteville, acting on behalf of appellant Treasure Company, was able to save the venture from immediate liquidation by arranging to have its creditors stand by until they could be paid out of the well's production [Tr. p. 234].

On June 1, 1939, suit was filed in the Superior Court of Los Angeles County (Case No. 441484), in which Scoville and Adamant Company (appellees herein) and said Seeple were included as parties plaintiff, and both de Bretteville and Treasure Company (appellants herein) were parties defendant.

The Complaint filed in the State Court sought a receivership for Treasure Well No. 8, an accounting from both defendants (who were alleged to be owners of the leasehold of Treasure Well No. 8) and an injunction restraining both defendants from interfering with the operation of the well [Deft. Ex. "Q," Clk. Tr. pp. 1-9]. The complaint did not seek recovery of any funds which had been furnished as completion costs for Treasure Well No. 8.

The suit was tried before the Hon. Joseph Vickers who entered judgment on November 27, 1940 (hereinafter called the "Vickers' Judgment") in which he denied

plaintiff's right to a receivership, denied injunctive relief to plaintiffs and held that neither defendant, Treasure Company, nor defendant, de Bretteville, owed anything to any of the plaintiffs as of January 31, 1939 [Deft. Ex. "Q," Clk. Tr. pp. 64-67].

The plaintiffs (appellees herein) appealed from the judgment but it was affirmed by the California District Court of Appeal (Fourth District). (*Walter B. Scoville, et al., Appellants v. G. de Bretteville, et al., Respondents,* 50 Cal. App. 2d 622 (1942).) A hearing by the California Supreme Court was denied on May 18, 1942.

Specifications of Error.

1. The District Court erred in concluding as a matter of law and in holding on the basis of such conclusion of law that G. de Bretteville and Treasure Company (appellants herein) are indebted to Walter B. Scoville and The Adamant Company (appellees herein) for $13,000.00 constituting reimbursement of advances made for the completion of Treasure Well No. 8 [Conclusions of Law VIII, Tr. p. 109; Judgment, Par. I, Tr. p. 111].

2. The District Court erred in failing to conclude as a matter of law and to hold that the defense of the statute of limitations is available to said G. de Bretteville and to said Treasure Company against any claim asserted by said Scoville and said Adamant Company for said $13,000.00.

3. The District Court erred in finding that, and in basing its judgment against said G. de Bretteville and

said Treasure Company upon the finding that said Walter B. Scoville did advance the sum of $13,000.00 to said Treasure Company for the completion of Treasure Well No. 8, and that such funds were advanced prior to completion of said well on or about December 7, 1938 [Finding IV, Tr. p. 103].

4. The District Court erred in failing to find that there is no evidence in this lawsuit which supports allegations set forth in Paragraphs IV and V of the Second Cause of Action of the Amended and Supplemental Complaint filed herein, that said Walter B. Scoville advanced to said Treasure Company and to said G. de Bretteville, between May 15, 1938, and December 15, 1938, the sum of $13,000.00 for placing said Treasure Well No. 8 on production or otherwise.

5. The District Court erred in failing to find that said G. de Bretteville was not a party to the joint venture for the development of said Treasure Well No. 8.

6. The District Court erred in failing to find and conclude that said G. de Bretteville is not liable for any debts of said Treasure Company to said Walter B. Scoville or to said The Adamant Company, if such indebtedness exists, as a joint adventurer or otherwise or at all.

7. The District Court erred in failing to find and conclude that the stipulation of counsel, entered into in open court in a previous State Court action, as set forth in Paragraph II of the Second Cause of Action in the Amended and Supplemental Complaint herein, does not constitute an admission in this lawsuit that either said G. de Bretteville or said Treasure Company owes to said Walter B. Scoville or to said The Adamant Company the sum of $13,000.00 or any part thereof.

ARGUMENT.

I.

Appellee Adamant Company Has Not Asserted Any Cause of Action in This Lawsuit to Support the Judgment Rendered in Its Favor Against Both Appellants de Bretteville and Treasure Company.

Paragraph IV of the second cause of action in the Amended and Supplemental Complaint alleges that appellee *Scoville* made advances of $13,000 which were expended in placing Treasure Well No. 8 on production [Tr. p. 6].

Paragraph V alleges that said $13,000 was advanced between May 15, 1938 and December 23, 1938 on condition that there would be returned to appellee *Scoville* two dollars for each one dollar so advanced, and that both appellants de Bretteville and Treasure Company agreed to pay the same to appellee *Scoville* out of the production of oil and gas from the said well [Tr. p. 7].

There is no allegation in the pleading that appellee Adamant Company advanced the said $13,000, nor that it was privy to any agreement with appellants for the repayment of the same, nor that appellee Adamant Company is the *alter ego* of appellee Scoville.

Paragraph 3 of the prayer is that "Walter B. Scoville have judgment against defendants * * *" [Tr. pp. 8-9].

The fact is that no recovery was sought for appellee Adamant Company in the Amended and Supplemental Complaint against either appellant de Bretteville or appellant Treasure Company for the repayment of any advances made for the completion of Treasure Well No. 8 and it follows that the District Court has awarded judgment to a party who has not asserted any cause of action therefor.

It is well settled that a judgment for the plaintiff must be supported by a complaint which states a cause of action against the defendant.

McClay v. Meads, 14 Cal. App. 363, at p. 373 (1910);

Austin v. Jones, 6 Cal. App. 2d 493, 44 P. 2d 667 (1935);

49 C. J. S., p. 96, §40(b).

It is also established that a judgment for the plaintiff may not be in direct contradiction to the material allegations of the complaint.

Eaton v. Rocca, 75 Cal. 93, 16 Pac. 529 (1888);

Von Drackenfels v. Doolittle, 77 Cal. 295, 19 Pac. 518 (1888).

II.

There Is No Finding of Fact by the District Court to Support Its Personal Judgment Against Appellant de Bretteville nor Is There Any Evidence in This Lawsuit to Support Such Personal Judgment.

A. The Judgment Holding Appellant de Bretteville Personally Liable Must Be Supported by Sufficient Findings.

49 *C. J. S.,* p. 106, in §45, states:

"A valid judgment must rest on findings, express or implied on all material issues."

In *Willard v. Glenn-Colusa Irrigation District,* 201 Cal. 726, 258 Pac. 959 (1927), the judgment of the trial court, declaring certain special assessments of the defendant irrigation district illegal and ordering reimbursement to land owner who had paid them, was reversed. The California Supreme Court said at page 749 of 201 Cal.:

"* * * The Complaint contains no averment that all respondents, or any of them, had paid any of said excess tolls or any part thereof and there is no finding that any such payment had been made. This part of the judgment, therefore, even should it be assumed that such tolls are invalid, would not be justified by the pleadings nor supported by the findings."

See also:

Gordon v. Beck, 196 Cal. 768, 239 Pac. 309 (1925);

Federal Rules of Civil Procedure, Rule 52.

B. The Judgment Is Not Based on Any Finding of Contractual Liability.

The District Court found that it was not true, as alleged by appellees, that either appellant de Bretteville or appellant Treasure Company had agreed to repay appellee Scoville two dollars for each one dollar advanced by him for the completion of Treasure Well No. 8 [Finding V, Tr. p. 103].

No other agreement was alleged by appellees except the aforesaid agreement dated April 5, 1938 [Tr. p. 7]. With respect to this agreement the District Court concluded as a matter of law that whatever rights appellee Scoville and appellee Adamant Company enjoyed thereunder were merged in the "Vickers Judgment" [Conclusion V, Tr. p. 108].

The "Vickers Judgment" was based upon an express finding that de Bretteville was not individually a party to the agreement dated April 5, 1938 [Deft. Ex. "Q," Tr. p. 31, lines 17-18].

The District Court made no finding that appellant de Bretteville had obligated himself to pay any sum to appellees as a matter of contract.

C. The Judgment Is Not Based on Any Finding of Wrongdoing.

During the trial, appellees Scoville and Adamant Company attempted to elicit testimony to support a finding that appellant de Bretteville is the *alter ego* of appellant Treasure Company [Tr. p. 200].

Appellees later retreated from this position and indicated that it would be satisfactory if judgment could be obtained against appellant de Bretteville in the event it were found that moneys due from appellant Treasure Company had not been accounted for and that he personally held funds which should have been in Treasure Company's pocket [Tr. pp. 211, 219].

The District Court made no finding that appellant de Bretteville is the *alter ego* of appellant Treasure Company, and during the trial made it abundantly clear that there was no sympathy from the Bench for appellee's efforts to have the corporate existence of appellant Treasure Company disregarded [Tr. pp. 200-209].

It should be emphasized that the District Court did find that there were no funds owing to appellees Scoville and Adamant Company in connection with the operation of Treasure Well No. 8 for which appellant Treasure Company had not accounted and that "there were no improper charges or withdrawals or misapplication of funds by defendant Treasure Company or by defendant G. de Bretteville during the period covered by said accounting" [Finding II, Tr. p. 102].

Furthermore, the District Court's Decision, filed April 11, 1955, stated that "no funds in which the plaintiffs or any of the other parties to the action have any interest are now in the possession of the defendants or either of them" [Tr. p. 93].

D. The Judgment Is Not Based on Any Finding That Appellant de Bretteville Received Any Payments for Completion Costs of Treasure Well No. 8.

The District Court's judgment states in paragraph I that judgment in the sum of $13,000 constitutes "reimbursement to plaintiffs for moneys advanced by *them* to *defendants* as part of the completion costs of Treasure Well No. 8" [Tr. p. 111]. (Emphasis added.)

The District Court's findings do not support the conclusion in the judgment that *both* plaintiffs (appellees herein) made advances of completion costs in the sum of $13,000 to *both* defendants (appellants herein).

On the contrary, the District Court's finding of fact is that *"Walter B. Scoville* did advance the sum of $13,000 *to defendant Treasure Company* for the completion of Treasure Well No. 8 and said Walter B. Scoville has received back no part of said funds so advanced" [Finding IV, Tr. p. 103]. (Emphasis added.)

Appellant de Bretteville was not a co-owner of the Treasure Well No. 8 leasehold. He managed the leasehold for and on behalf of appellant Treasure Company but, as manager of the operation, he had no individual duty to account to either appellee Scoville or appellee Adamant Company. These particular issues were determined by the Vickers Judgment [Deft. Ex. "Q," Tr. p. 31, lines 19-26; p. 35, lines 21-26; and p. 38, lines 20-21] and are *res judicata*.

III.

The Judgment Is Not Based on Any Finding That Either Appellant de Bretteville or Appellant Treasure Company Has Admitted an Obligation to Repay to Appellee's Scoville and Adamant Company, or Either of Them, Any Payments Made for Completing Treasure Well No. 8.

There is no evidence in this lawsuit from which the District Court could make a proper finding that payments totalling $13,000 were in fact made by either appellee Scoville or appellee Adamant Company.

But even if the finding could be supported that payments amounting to $13,000 were made, the obligation to repay them by no means follows as a necessary conclusion of law.

The District Court observed at the conclusion of the trial that there had been no evidence to show that $13,000 had in fact been advanced unless "there are admissions in the record showing that that amount is *due*" [Tr. p. 238]. (Emphasis added.)

Neither the findings of fact nor the conclusions of law filed by the District Court point to any such admission in the record.

It is apparent, however, that the District Court held that the $13,000 had been advanced because of what it construed to be an admission in the record. The Court's Decision refers to the sum of $13,000 "admittedly advanced by Scoville" [Tr. p. 93].

Certainly there is no such admission in the pleading filed by appellants de Bretteville and Treasure Company. Their Answer flatly denied all allegations that they or either of them had agreed to repay "to the said Walter B. Scoville, or to either of said plaintiffs, the sum of

$13,000.00, or any part thereof, two for one, or the said sum of $13,000.00, or any part thereof at all" [Tr. p. 12].

Their Answer also set forth as an affirmative defense allegations that funds actually received by appellant Treasure Company after November 2, 1938 for the completion of Treasure Well No. 8 were in pursuance of the compromise settlement of the dispute between appellant Treasure Company and appellees Scoville and Adamant Company. The terms of the settlement on November 2, 1938 were alleged, including the settlement of litigation and the restoration of the contract rights of appellees Scoville and Adamant Company upon their promise to provide the money necessary to complete Treasure Well No. 8 [Tr. pp. 18-19].

Appellees Scoville and Adamant Company argue that the statements made by counsel for appellants de Bretteville and Treasure Company in connection with a stipulation made in case No. 441,484 in the Superior Court of Los Angeles County, as quoted at length in paragraph II of the second cause of action of the Amended and Supplemental Complaint herein, constitutes an admission that the $13,000 is due to them.

It is submitted that the said stipulation was intended to do nothing more than exclude the issue of the plaintiffs' claim for reimbursement of the $13,000 from the issues of that particular case. It was not an agreement distinctly and formally made for the express purpose of relieving the plaintiffs from proving any fact. What was said in passing, by way of describing the subject matter of the stipulation, cannot be taken out of context and distorted into an admission which was not intended.

Casaretto v. De Lucchi, 76 Cal. App. 2d 800 at p. 809, 174 P. 2d 328 (1946).

IV.

The District Court's Conclusion of Law IV, That Appellants G. de Bretteville and Treasure Company Are Indebted to Appellees Walter B. Scoville and the Adamant Company for $13,000.00 Advanced for Completion of Treasure Well No. 8, Consitutes an Erroneous Conclusion That the Defense of Limitations Is Not Available to Said Appellants.

At the conclusion of the trial and after oral argument, the District Court observed that *if there were* admissions in the record showing that the sum of $13,000.00 is due to appellees Scoville and Adamant Company, then the defense of the statute of limitations would not be available to appellants de Bretteville and Treasure Company [Tr. p. 238].

The defense of the statute of limitations has been raised by appellants de Bretteville and Treasure Company as affirmative defenses in their Answer to the second cause of action in the Amended and Supplemental Complaint [Tr. p. 26].

The Findings of Fact and Conclusions of Law of the District Court make no specific reference to the issue of the applicability of the defense of limitations to the claim for the said $13,000.00.

The original Complaint in the subject lawsuit was filed on September 10, 1941, and any *oral* agreement involving reimbursement of the said $13,000.00 which might have been made on or before December 23, 1938 [Tr. p. 7, Par. V], would have been outlawed under the provisions of Subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California.

The Amended and Supplemental Complaint does not assert any right to reimbursement of the said $13,000.00 under any *written* agreement.

Conclusion.

It is respectfully submitted that the judgment of the District Court is erroneous in so far as it holds that appellants G. de Bretteville and Treasure Company are liable to appellees Walter B. Scoville and the Adamant Company, for the sum of $13,000 as reimbursement of the costs of completing Treasure Well No. 8.

Respectfully submitted,

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